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No. 91-55

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and ROGER TOWNE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute of limitations bars a RICO conspiracy prosecution where the predicate acts described in the indictment occurred outside the limitations period, if the conspiracy itself continued into the limitations period.

2. Whether the Sixth Amendment requires reversal of petitioner Fitzsimmons' conviction because a government informant taped conversations with petitioner Fitzsimmons, even though the recording did not aid the prosecution.

3. Whether the Fifth Amendment requires reversal of petitioner Towne's conviction because the informant's recording was not released to Towne until after his trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 415-490) is unreported, but the judgment is noted at 927 F.2d 605 (Table). The opinions of the district court (Pet. App. 286-319, 320-340, and 341-402) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1991. A petition for rehearing was denied on April 22, 1991. Pet. App. 518. The petition for a writ of certiorari was filed on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiring to participate in an enterprise through a pattern of racketeering activity, in violation of the Racketeer-Influenced and Corrupt Organizations statute (RICO), 18 U.S.C. 1962(d). The district court sentenced petitioner Fitzsimmons to five years' imprisonment and fined him $5,000; it sentenced petitioner Towne to three years' imprisonment and fined him $20,000. The court of appeals affirmed. Pet. App. 415-490.

1. Petitioner Towne was a principal of Delaware Professional Services, Inc. (DPS). Petitioner Fitzsimmons was a trustee for the Michigan Conference of Teamsters Welfare Fund (the Fund). Starting in 1979, Towne and others gave money and other things of value to Fitzsimmons and other trustees to secure their assistance in causing the Fund to grant health-care delivery contracts to DPS. During the spring and summer of 1979, Towne gave free airline tickets to a trustee named Collins. From 1979 through 1981, Towne and his associates frequently purchased meals and drinks for Collins. Finally, they put Collins' girlfriend on their payroll and rented an apartment for Collins and her. With Collins' encouragement, the Fund accepted a DPS dental plan in May 1979 and an optical plan in early 1980. Collins subsequently left the fund and began working for one of Towne's associates. Pet. App. 420-423.

From September to December of 1979, Towne and his associates frequently entertained Fitzsimmons. In January 1980 Fitzsimmons resigned his trustee position because of an unrelated criminal conviction, but an associate of Towne's continued lending money to

Fitzsimmons in amounts inconsistent with his ability to pay; the "loans" were never repaid. Finally, in 1982, because the Fund was losing considerable sums of money on the medical plans purchased from DPS, the Fund terminated its relationship with the DPS medical plans. Pet. App. 424-429.

An indictment was returned on December 21, 1984, charging petitioners with substantive RICO violations (18 U.S.C. 1962(c)), RICO conspiracy (18 U.S.C. 1962(d)), and giving and accepting things of value as bribes to influence the Fund's decisionmaking (18 U.S.C. 1954). Pet. App. 1-69.

2. After the indictment had been returned and Fitzsimmons had retained an attorney, an informant named Lenny Schultz approached the Justice Department and offered to elicit information from Fitzsimmons in return for the government's agreement to enter into a favorable plea agreement regarding certain drug charges that were pending against him. Because Fitzsimmons then was a subject of a nationwide labor racketeering investigation, the Department agreed to his offer. Schultz ignored the instructions, discussed this case with Fitzsimmons, and urged him to strike a deal with the government. Pet. App. 458-459.

When the prosecutors involved in this case learned of the transcript of Schultz's conversations with Fitzsimmons, they decided to use it only for impeachment purposes and sought a protective order to prevent disclosure of the transcript, in order to protect Schultz's identity. The district court concluded that the transcript did "not contain exculpatory information within the meaning of *Brady* v. *Maryland*, 373 U.S. 83 (1963)," and entered a protective order allowing the government not to disclose the transcript to petitioners. Pet. App. 99-101, 459.

3. Before trial, petitioners sought dismissal of the indictment, arguing that the prosecution was barred by the five-year statute of limitations set forth in 18 U.S.C. 3282. The district court initially concluded that none of the counts of the indictment were barred. Pet. App. 298-319. After trial, however, the district court reversed its ruling with regard to the substantive offenses and granted petitioners' motions for arrest of judgment with respect to the substantive RICO charges and the Section 1954 charges, concluding that those statutes require the government to prove discrete criminal acts within the limitations period. *Id.* at 338-339. With respect to the RICO conspiracy charge, however, the district court adhered to its earlier opinion and thus denied petitioners' motions for arrest of judgment. *Id.* at 339-340; see *id.* at 308-318.

4. Some time after the trial, informant Schultz was tried and his identity revealed. Accordingly, the government had the protective order lifted and delivered a copy of the transcript to petitioners. Petitioners then filed a motion for a new trial. Fitzsimmons contended that the government had violated his Sixth Amendment rights by taping the conversations, and both petitioners argued that the government's failure to release the transcript before trial violated the Fifth Amendment.

The district court disagreed. As for the Sixth Amendment claim, the district court agreed with Fitzsimmons that Schultz's conversations with him violated the Sixth Amendment, see Pet. App. 388-389, but concluded that a new trial was not warranted because Fitzsimmons had failed to show that he was prejudiced by the existence of the transcript. The court noted that none of Fitzsimmons' admissions in the transcript were introduced against him at trial,

that the transcript revealed no substantive information not already in the possession of the government, and that Fitzsimmons had not shown that Schultz's conversations with him adversely affected his attorney-client relationship. *Id.* at 389-393. The district court also rejected petitioners' Fifth Amendment claim based on *Brady* v. *Maryland*, 373 U.S. 83 (1963), reaffirming its conclusion that the "transcript * * * did not contain exculpatory evidence." *Id.* at 399.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 415-490.

a. The court rejected Fitzsimmons's Sixth Amendment claim based on its conclusion that Fitzsimmons had not shown any prejudice. Pet. App. 460-462. It also rejected Fitzsimmons' argument that prejudice must be presumed from the government's acquisition of the transcript, concluding that a presumption of prejudice would be appropriate only if the informant had conveyed the contents of confidential attorney-client conversations to the government. *Id.* at 460-462.

b. The court also rejected petitioners' Fifth Amendment claims that were based on the government's failure to disclose the transcript until after trial. Pet. App. 462-469. The court noted that a retrial was necessary only if "there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 462 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). It then reviewed the transcript and concluded that the material contained "very little information [that] has exculpatory value" as to Fitzsimmons. Pet. App. 462. Similarly, it regarded the exculpatory value of the statements concerning Towne as "slight," and noted that several of

the statements regarding him "tend to be incriminating." *Id.* at 468.

c. The court of appeals also rejected petitioners' argument that the RICO conspiracy counts could not be sustained because the statute of limitations had run with respect to the predicate acts described in the substantive RICO count that was dismissed by the district court. Pet. App. 474-487. The court of appeals explained that the statute of limitations began to run at the time of the termination of the conspiracy, not at the time of the commission of the predicate acts, because "it is the agreement to commit these acts, not the acts themselves, that is the basis of the conspiracy conviction." *Id.* at 487. Because the conspiracy continued into the limitations period, the court held that the conspiracy charge was not time-barred. *Id.* at 485-486.

ARGUMENT

1. Petitioners first contend (Pet. 16-29) that the five-year statute of limitations set forth in 18 U.S.C. 3282 bars their conviction on the RICO conspiracy count. They argue that the statute of limitations barred prosecution for the predicate acts described in the indictment, and that those acts therefore may not serve as predicate acts for a RICO conspiracy charge.

As the court of appeals concluded, the question whether the predicate acts charged in the substantive RICO count were time-barred at the time of the indictment is irrelevant to the question whether the statute of limitations barred the RICO conspiracy count. In the case of conspiracies having no overt act requirement, such as RICO conspiracies, the limitations period is measured by reference to the duration of the criminal agreement, not the particular activi-

ties in which each defendant engages. *Hyde* v. *United States*, 225 U.S. 347, 369-370 (1912); *United States* v. *Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). The statute of limitations for a charge of conspiracy does not begin to run until the conspiracy as a whole terminates or until the defendant in question takes "some act to disavow or defeat the purpose" of the conspiracy. *Hyde*, 225 U.S. at 369; see *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *United States* v. *Brock*, 782 F.2d 1442, 1445 (7th Cir. 1986); *Grammatikos*, 633 F.2d at 1023. In the case of a RICO conspiracy, the limitations period therefore runs from the accomplishment or abandonment of the conspiracy. *E.g.*, *United States* v. *Torres Lopez*, 851 F.2d 520, 524-525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989); *United States* v. *Persico*, 832 F.2d 705, 713-714 (2d Cir. 1987), cert. denied, 486 U.S. 1022 (1988); *United States* v. *Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984), Under this test, petitioners' convictions are valid, because the conspiracy did not terminate until less than five years before the indictment, and because neither petitioner withdrew from the conspiracy before it terminated.

Petitioners err in relying (Pet. 24-29) on *Stromberg* v. *California*, 283 U.S. 359 (1931), and related cases. Those cases stand for the proposition that an indictment does not properly charge conspiracy if the objects of the conspiracy are not themselves unlawful. But that proposition has no relevance to this case, because petitioners cannot show that the objects of the RICO conspiracy of which they were convicted were lawful. Petitioners do not argue in this Court that the actions described in the indictment were lawful when taken; they argue only that the statute of

limitations has placed those acts beyond the reach of criminal sanctions. Because the limitations period for the RICO conspiracy charge had not run at the time petitioners were indicted, that count was not time-barred.

2. Petitioner Fitzsimmons also contends (Pet. 29-46) that the court of appeals erred in rejecting his Sixth Amendment claim on the ground that he failed to show that he had been prejudiced.

As this Court has explained, a Sixth Amendment violation that does not prejudice the defendant "provides no justification for interfering with * * * criminal proceedings." *United States* v. *Morrison*, 449 U.S. 361, 366 (1981); see *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977) ("there can be no Sixth Amendment violation" absent "at least a realistic possibility of injury"). The district court and the court of appeals have reviewed the record here and concluded that Fitzsimmons was not in fact prejudiced, see Pet. App. 389-393, 460-462; his factbound claims to the contrary do not merit further review.[1]

Nor is there any merit to Fitzsimmons' contention that the decision below conflicts with the decisions of the Third Circuit in *United States* v. *Levy*, 577 F.2d 200 (1978), and the District of Columbia Circuit in *Briggs* v. *Goodwin*, 698 F.2d 486, 493, rev'd on rehearing on other grounds, 712 F.2d 1444 (1983), cert. denied, 464 U.S. 1040 (1984). Neither case holds that a defendant can secure reversal of his

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[1] Contrary to Fitzsimmons' suggestion (Pet. 33), the lower courts did not find that Fitzsimmons suffered no prejudice simply because the information was not introduced at trial. Both courts concluded that Fitzsimmons was not prejudiced because the information was *neither* introduced at trial *nor* otherwise helpful to the government. See Pet. App. 391-393, 460.

conviction without establishing prejudice. *Levy* concluded that a defendant adequately established prejudice by showing that confidential attorney-client communications had been disclosed to the government. As the court of appeals concluded, no such information was disclosed here. *Briggs* was not a criminal prosecution at all, but a *Bivens* action against a prosecutor in a case in which the defendant had been acquitted; that case has little relevance in determining the appropriate remedy for the alleged Sixth Amendment violation that occurred in this case. The court of appeals' conclusion that Fitzsimmons was not prejudiced merits no further review.[2]

3. Finally, petitioner Towne contends (Pet. 46-55) that the lower courts erred in concluding that the transcript of Schultz's conversations with Fitzsimmons was not exculpatory. Accordingly, Towne argues, his conviction should be reversed because of the government's failure to deliver the transcript to him before the trial.

Both courts below reviewed the transcript and concluded that it was not exculpatory. Pet. App. 101, 401-402, 466-469 (noting that the "exculpatory

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[2] Fitzsimmons contends (Pet. 30) that this Court should grant certiorari to resolve the question whether the defendant or the government bears the burden of establishing or disproving prejudice, an issue discussed by Justice White in his dissent from denial of certiorari in *Cutillo* v. *Cinelli*, 485 U.S. 1037 (1988). This case is not an appropriate vehicle to resolve that issue, because the question was not discussed or decided by the court of appeals, cf. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982), and because there is no reason to believe that the courts below would have concluded that Fitzsimmons was prejudiced even if they had specifically held that the government bore the burden of establishing the absence of prejudice.

value" is "slight" and that several of the statements "tend to be incriminating"). The lower courts' conclusion that the transcript was not exculpatory does not conflict with the decisions of other courts of appeals nor does it raise any legal question of general significance. In substance, Towne challenges a factual assessment in which both of the lower courts concurred, a matter generally not suitable for review in this Court. See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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